IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1398

JOHN W. WARNER, Secretary of the Navy,

Petitioner,

v.

JOHN W. FLEMINGS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

On October 7, 1970, respondent John W. Flemings filed a verified *pro se* petition, designated "Complaint for a Mandatory Injunction," in the United States District Court for the Eastern District of New York seeking relief with respect to a 1944 court-martial conviction for theft

of an automobile. Respondent alleged, *inter alia*, that he had been denied due process of law because the "Military Tribunal in this case, was invalid and void [sic] without jurisdiction to proceed" (A. 5). Respondent also alleged that he was denied the opportunity to confront his accusers and denied assistance of counsel. He prayed that the court "in due consideration of the merits set forth herein by a layman . . . entertain the foregoing petition as being the appropriate remedy . . . and order . . . said procedures . . . void, *ab initio* and without jurisdiction. . . ." (A. 9.)

On January 29, 1971, the Secretary of the Navy, by counsel, filed a verified answer generally denying the allegations of the complaint but admitting certain facts as to the time, nature, and circumstances of the respondent's 1944 court-martial.

On the basis of the complaint, the answer, and military records and affidavits presented by the parties, it appears that respondent joined the United States Navy at the age of eighteen on May 11, 1944. Upon the completion of his boot camp training at Great Lakes Naval Station in Illinois, he was sent to an ammunition depot at Earle, New Jersey. While serving at the depot, respondent was issued a pass for a 72-hour leave, due to expire on or about August 7, 1944 (A. 16). He did not return to his post and on or about August 18, 1944, respondent was arrested by Pennsylvania State Police (A. 31).

Respondent alleged that he was picked up by a sailor while hitchhiking outside Norristown, Pennsylvania. Flemings was dressed in civilian clothes at the time. Arriving in Lewiston, Pennsylvania, the sailor asked

respondent if he had any money as the car was low on gas; respondent informed the sailor that he was without funds. The sailor said he did not have any money either but that there were two spare tires in the trunk of the car and that he would trade them for gas. The sailor found a gas station and the trade was made.

At dusk, the sailor stopped in front of a farm house along the road, informed respondent that he was going into the house to see if a friend was home, and said that he would be right back. While Flemings awaited the sailor's return, two state troopers stopped by the parked car and one asked Flemings what he was doing. While respondent spoke to them, the second trooper, who had apparently stayed in the patrol car, "observed the unknown sailor hightailing up a hill behind the said house." (A. 4.)

The troopers took respondent to their barracks in Hollidaysburg, Pennsylvania, where respondent alleges that he first learned the car was stolen. The automobile, a 1942 Chevrolet sedan, qwned by one Earnest Bush, was stolen from a city street in Trenton, New Jersey, on August 18, 1944.[1]

After questioning respondent, the troopers took him to the gas station (where the tire trade allegedly was made) in order to obtain a statement from the attendant as to who was driving the car and who made the deal for the trade of the tire. According to respondent, the attendant gave the troopers a statement and an affidavit corroborating his story.

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[1] Flemings was ultimately charged with theft of the vehicle of "a civilian" (A. 17), but the investigation of respondent's present counsel has determined that Bush was in the military at the time, although the vehicle in question was used for no military purpose (A. 50).

Respondent was eventually returned to his base at Earle, New Jersey, where he was confined. From there, plaintiff was taken to Harts Island, New York. After being detained for approximately five weeks at Harts Island, he was taken to the Brooklyn Naval Yard where court-martial proceedings were held. Respondent claims that on the advice of his Navy "counsel," a Lt. Folly, that he would obtain a light sentence, he entered a plea of guilty to charges of automobile larceny and being absent without leave for 13 days. In respondent's words,

> During the interview, he [Lt. Folly] advised me to enter a plea of guilty to the said charge because I would only get a "moderate sentence" instead of ten years; plus, the fact that the weight of the evidence was against me.
>
> Thereafter I was carried back to the Brooklyn Naval Yard to stand trial. (A. 4-5.)

Navy records appended to the Secretary of the Navy's answer, and not controverted, show that respondent was tried by a general court-martial at the Brooklyn Naval Yard, New York, on October 2, 1944; that he had the assistance of "counsel"; that he pled guilty to both charges; that he did not make a statement; that he was found guilty on his pleas; and that he was sentenced to three years' incarceration, loss of pay, and dishonorable discharge. After 26 months of confinement, respondent was released and dishonorably discharged.

On March 19, 1971, respondent moved for summary judgment. On April 22, 1971, the Secretary of the Navy cross-moved for summary judgment and moved to dismiss the complaint. Disposition of the motion was stayed pending exhaustion of military remedies by respondent. Subsequent to an unsuccessful attempt to obtain relief from the military, on July 19, 1971, the

district court granted Flemings' motion for summary judgment. The court determined that the offense of auto theft was not "service connected" within the meaning of *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971); that a ruling limiting *O'Callahan* to prospective effect was not appropriate given the jurisdictional basis of the rule announced in *O'Callahan*; and that application of the principles governing the retroactive effect of decisions announcing new procedural rules likewise resulted in a retroactive application of *O'Callahan*. In the alternative, the court held that an independent constitutional right—trial in the vicinage—had been denied respondent. The matter was remanded to the Board for Correction of Naval Records with instructions to erase the conviction for automobile theft and dishonorable discharge and to enter a discharge of no greater disapprobation than bad conduct[2] (330 F. Supp. 193).

The Secretary of the Navy appealed, but the court of appeals affirmed the judgment of the district court. The court concluded that *O'Callahan* had set forth a jurisdictional rule which should be accorded full retroactive application. The court also agreed with the district judge that application of principles applied by this Court when considering the retroactivity of new rules of criminal procedure also led to a retroactive application of *O'Callahan*. Finally, the court of appeals held that the auto theft involved in this case was not service connected (458 F.2d 544).

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[2]The maximum punishment for a thirteen day unauthorized absence was six months' confinement (plus the period of absence), loss of pay and allowances during a like period, reduction to the lowest enlisted pay grade and a bad conduct discharge (330 F. Supp. at 194).

SUMMARY OF ARGUMENT

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), this Court ruled that the constitutional power of Congress to vest jurisdiction in courts-martial is restricted to cases where the offense charged involves a paramount military interest. A fundamental principle of Anglo-American law requires that if a tribunal lacks jurisdiction over the subject matter or the parties, its purported judgments are void. The government has not called the Court's attention to any case involving the jurisdiction of a court of criminal jurisdiction which casts doubt upon this settled rule. Institutional considerations involving the differences between courts and legislatures suggest that in the absence of compelling circumstances the Court should not abandon the well established doctrine that the judgment of a court without jurisdiction is void. Cases which hold that a restricted class of new procedural rights are to be applied prospectively in no way authorize a court without adjudicatory power to convict. On the contrary, the position taken by the government in this case was rejected in *United States v. United States Coin and Currency*, 401 U.S. 715 (1971).

Application of the three factor test employed by this Court to determine the retroactivity of new procedural rules also compels a finding that *O'Callahan* applies to a 1944 Navy court-martial for an offense without substantial service connection. Although in many respects military justice now compares favorably with civilian justice, this was not the case when respondent was tried in 1944.

John W. Flemings was court-martialed at a time when court-martial procedures raised a clear danger of convicting the innocent. Prior to the enactment of the Uniform Code of Military Justice, "Americans in uniform

had been at the mercy of legal procedures little changed since before the Revolutionary War, procedures originally designed for mercenaries. . . ." (115 Cong. Rec. S 6760-61 (Daily ed. June 19, 1969)). The fact finding body that confronted Flemings consisted of a panel of officers hand picked by the commanding officer who convened the tribunal and who not only had direct command authority over the members of the panel but normally evaluated the efficiency of panel members. In addition to this obvious opportunity for command influence, Flemings was confronted with an absence of the procedural protections normally associated with reliability and fairness. He had no right to peremptorily challenge any members of the panel, no right to legally trained counsel, and no right to trial in the vicinage. He was dependent on the prosecution for process to obtain evidence and witnesses. The convening authority was empowered to replace sitting members of the tribunal and to appoint new members during the course of the trial. A bare majority was sufficient for conviction. Challenges for cause were severely limited and Flemings had no right to demand that enlisted men be represented on the court-martial panel. In short, whatever the resolution of the retroactivity question with respect to post-Uniform Code cases, Flemings' case raises due process considerations of the highest order. Both courts below found those considerations compelling and their disposition should not be disturbed.

This Court's *O'Callahan* decision was foreshadowed in a line of cases restricting military jurisdiction. The government cannot claim that it relied on unrestricted court-martial jurisdiction prior to *O'Callahan*. Informal agreements between the Department of Defense and both state and federal prosecutorial officials resulted in the regular delivery of servicemen who committed civilian offenses to the civilian authorities.

The government offers insufficient evidence that retroactive application of *O'Callahan* will have an adverse effect on the administration of justice. The military courts have applied *O'Callahan* to cases on direct review. Approximately one percent of all general court-martial cases tried before *O'Callahan* and appealed to the military courts between June 2, 1969 and December 31, 1970, contained offenses that were not service connected. Government officials have conceded that few successful petitions for review have resulted from *O'Callahan*. There are, therefore, few, if any, men presently confined who are entitled to relief under *O'Callahan*.

The overwhelming majority of all off-post criminal cases involving servicemen have been tried in the federal or state courts. Of the remainder, many are plainly service connected, thereby not raising *O'Callahan* issues, because they took place on a military post, outside the United States, or because the offense itself was plainly service connected. Thus relatively few cases will raise *O'Callahan* issues in order to obtain correction of military discharge status. These cases fall within the jurisdiction of military boards of correction; such problems as arise from application of *O'Callahan* to old cases will be handled on an administrative basis by agencies set up by Congress to adjust discharge status.

The judgment of the court below should also be affirmed on the ground that respondent was denied his right, guaranteed by Article III, Section 2, Clause 3, to trial in the vicinage. Respondent was taken from the state where the alleged offense took place to another state for trial. At the time, a Navy court-martial could not subpoena civilian witnesses from outside the state where the court was sitting. The district court found that

removal of the trial from the vicinity of the alleged criminal act made it difficult, if not impossible, for respondent to mount a defense.

Flemings' offense of auto larceny was in no sense service connected. Of the twelve relevant factors enumerated by the Court in *Relford v. Commandant*, 401 U.S. 355 (1971), only two would arguably support a conclusion that military jurisdiction was justifiable. The Court of Military Appeals has squarely held that one of the two factors—the fact that the offender was absent without leave—is insufficient to create military jurisdiction for a civilian offense which took place while the serviceman was absent. The military plainly has the power to protect its special needs by punishing the offense of absence without leave. Nor does the record contain evidence supporting the government's suggestion that there might be a connection between the car theft and Flemings' absence from his post.

Flemings was convicted of auto theft during wartime but his offense had no effect on the war effort and was in no way connected to the special wartime needs of the military. The civilian courts were open and able to dispose of the offense. This Court has often expressed a preference for civilian disposition in such circumstances. The military interest in exercising court-martial jurisdiction is greater in wartime, but the rule that the government seeks will mean that all offenses by servicemen are service connected if committed in wartime, regardless of the circumstances of the offense or the character of military operations. Such a result is totally contrary to the spirit of *O'Callahan* and *Relford*.

ARGUMENT

I.

THE LOWER COURTS CORRECTLY APPLIED *O'CALLAHAN v. PARKER* RETROACTIVELY TO VOID RESPONDENT'S COURT-MARTIAL CONVICTION FOR AUTO THEFT.

This case raises the question of the application of *O'Callahan v. Parker*, 395 U.S. 258 (1969) to a court-martial conviction finalized prior to the date of decision in *O'Callahan*–June 2, 1969. Both the district court and the court of appeals concluded that John W. Flemings was entitled to challenge his 1944 court-martial conviction for automobile theft. They held that *O'Callahan* must be applied retroactively because it was grounded in the absence of jurisdiction to adjudicate and that the government had failed to present reasons sufficient to justify departure from the "fundamental" rule of "our common law jurisprudence" that convictions rendered by a court lacking either personal or subject matter jurisdiction are void. (458 F.2d at 550.) Additionally, as a separate and independent ground supporting their judgments, both courts held that application of criteria formulated to determine the retroactivity of new procedural rules required that *O'Callahan* be given retroactive effect.

In the courts below, the parties disagreed as to whether *O'Callahan* decided that military tribunals lacked adjudicatory power over servicemen's offenses which were not "service connected." Flemings contended that his court-martial lacked power over the subject matter and over his person because Congress had had no constitutional power to vest it. The government argued that *O'Callahan* decided that "the lack of grand and petit

jury procedures (and perhaps other civilian court protections) resulted in the loss of jurisdiction otherwise within the control of government to grant." *Gosa v. Mayden*, 450 F.2d 753 (5th Cir. 1971), *cert. granted*, June 19, 1972, No. 71-6314.

The government appears to have abandoned this position. Nevertheless, the government's present position with respect to the basis of *O'Callahan* is not free of doubt. As respondent argues that there is "no basis for concluding that this case fits within the same mold as *Mapp* and others where convictions were overturned not because the trial court lacked adjudicatory power, but because procedures were constitutionally defective. . . ." (458 F.2d at 550.), discussion of the precise basis of the *O'Callahan* decision is appropriate.

O'Callahan involved an inquiry into the extent of the power granted Congress by Article I, Section 8, Clause 14 to vest courts-martial with jurisdiction over crimes committed by servicemen. The Court reasoned that a "court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved." (395 U.S. at 265.) While a system of specialized military courts, in which all the constitutional safeguards normally afforded citizens of the United States charged with crime are not provided, may be necessary to protect the effectiveness of the military, "the justification for such a system rests solely on the special needs of the military." (*Ibid.*) Consequently, the jurisdiction of courts-martial is constitutionally limited to conduct which creates a special need for military disciplinary action.

As the court of appeals emphasized, *O'Callahan* "did not 'reform' court-martial procedures or suggest that

current procedures are inadequate in trials for offenses which are service connected. Nor did the Court suggest that courts-martial constitutionally could assume jurisdiction over offenses which are not service connected if they provide the protective benefits of grand jury indictment and trial by jury." (458 F.2d at 550.) *O'Callahan* was "a proceeding challenging the jurisdiction of a court-martial. . . . Its major thrust is directed to the *basic differences between systems* of military and civilian courts rather than a few defects of procedure." (*Flemings v. Chafee*, 330 F. Supp. 193, 196 (E.D. N.Y. 1971)(emphasis supplied).)

Certainly, *O'Callahan* relied upon procedural deficiencies in the courts-martial[3] but it did so "primarily as illustrative of these fundamental differences" between "systems of . . . courts" with different purposes. A fair reading of *O'Callahan* supports the conclusion that the Constitution rigidly differentiates between Article III courts and courts-martial because "a system of military justice . . . [has] fundamental differences from the practice in the civilian courts" (395 U.S. at 262):

> It still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution deemed essential

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[3]The "constitutional stakes" in *O'Callahan* were not limited to trial by jury, as is suggested by the government. This Court's decision enumerated several respects in which civil and military courts were distinct, calling attention to:

> differences with respect to tenure of judges and command influence . . . differences in the access of the defense to compulsory process . . . differences in evidence and procedure. . . . (330 F. Supp. at 196.)

to fair trials of civilians in federal court. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. (*O'Callahan, supra* at 262-3.)

* * * * *

The presiding judge at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminished salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. (*Id.* at 264.)

An examination of this Court's opinion in *O'Callahan* demonstrates further that the Court's "use of the term jurisdiction, in context, denotes lack of power over the subject or person" (*Flemings, supra*, 330 F. Supp. at 196). Judge Weinstein noted the following language in *O'Callahan*, which strongly suggests that it is a jurisdictional case in the classic sense:

The fact that courts-martial have no *jurisdiction* over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited *jurisdiction* over soldiers, regardless of the nature of the offenses charged. (395 U.S. at 267 (emphasis supplied).)

* * * * *

Status is necessary for *jurisdiction*; but it does not follow that ascertainment of status completes the inquiry, regardless of the nature, time, and place of the offense. (*Ibid.* (emphasis supplied).)

* * * * *

The *jurisdiction* of British courts-martial over military offenses which were also common-law felonies was from time to time extended, but, with the exception of one year, there was never any general military *jurisdiction* to try soldiers for

ordinary crimes committed in the British Isles. (395 U.S. at 269 (emphasis supplied).)

* * * * *

In 1950, the Uniform Code of Military Justice extended military *jurisdiction* to capital crimes. . . . (*Id.* at 272 (emphasis supplied).)

* * * * *

We have concluded that the crime to be under military *jurisdiction* must be service connected. (*Ibid.* (emphasis supplied).)

This Court itself, in *Relford v. Commandant*, 401 U.S. 355, 356 (1971), referred to the *O'Callahan* holding as follows:

By a five-to-three vote, the Court held that a court-martial *may not try* a member of our Armed Forces charged with attempted rape of a civilian, with housebreaking, and with assault with intent to rape, when the alleged offenses were committed off-post on American territory, when the soldier was on leave and when the charges could have been prosecuted in a civilian court. (Emphasis supplied.)

The *Relford* characterization of the *O'Callahan* holding strongly suggests that the power of the court-martial was at issue, not simply the right to jury trial.

Finally, *O'Callahan* succeeded and relied upon a line of cases limiting the adjudicatory power of courts-martial. All of these cases discuss the authority of courts-martial in jurisdictional terms:

We do not write on a clean slate. The attitude of a free society toward the *jurisdiction* of military tribunals—our reluctance to give them authority to try people for non-military offenses—has a long Constitutional history. *Lee v. Madigan*, 358 U.S. 228, 232 (1958) (emphasis supplied).

* * * * *

> Free countries of the world have tried to restrict military tribunals to the narrowest *jurisdiction* deemed absolutely essential to maintaining discipline among troops in active service. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955). (Emphasis supplied.)
>
> * * * * *
>
> For no matter how practical and how reasonable the *jurisdiction* might be, it still cannot be sustained if the Constitution guarantees to these Army wives a trial in an Article III court. . . . *Reid v. Covert*, 354 U.S. 1, 74 (1957). (Emphasis supplied.)

In sum, *O'Callahan* dealt with differences between systems of justice. Absence of trial by jury and compulsory process, difference in evidence and procedures, tenure of judges, and command influence were considered by the Court as illustrating the fundamentally different purpose of the two systems. Time and time again, the opinion adverts to jurisdiction in terms which, as the district court noted, evidence that the word implies a lack of power over the subject or person. Even Mr. Justice Harlan's dissenting opinion viewed the "jurisdiction" involved in *O'Callahan* as the power to adjudicate, and formulates the question involved as whether the grant of jurisdiction to military courts has exceeded the reach of Congressional power. (395 U.S. at 274.) In *Gosa, supra*, the Fifth Circuit agreed that *O'Callahan* was a jurisdictional case in the classic sense and based its conclusion on the reasoning of Judge Weinstein's opinion in the present case.[4]

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[4] [W]e find the reasoning of *Flemings* persuasive on this issue. Read with an open mind, *O'Callahan's* foundation, framework, and structure deny to the legislation which breathed the breath of judicial life into the forum that tried Sgt. O'Callahan, the necessary basis in constitutional power to reach this type of case. (450 F.2d at 757.)

The *Gosa* court, however, found that *O'Callahan* could be denied retroactive effect by virtue of the application of the three factor test that this Court has applied to non-jurisdictional rules. We argue, *infra* pp. 25-48, that the courts below correctly concluded that the proper application of this test results in the retroactive application of *O'Callahan*, but Flemings believes that this Court properly rests a finding of retroactivity on the jurisdictional nature of *O'Callahan*.

The government appears to contend that even conceding that Flemings' court-martial lacked adjudicatory power the fact that this Court did not so rule until 1969 renders the jurisdictional defect insignificant. The Court is asked to ignore the long and rich history of the doctrine that a criminal adjudication rendered by a tribunal without jurisdiction is illegal and void because otherwise it will "pretend" that the law is "discovered" rather than "evolves."

Surely the government has a heavy burden of persuasion in asking the Court to discard such a long accepted aspect of our jursiprudence. If judicial decisions are to be perceived as governed by law, rather than attributed to the shifting opinions of judges, institutional considerations require that retroactivity be the general rule. It requires no slavish acceptance of the ancient view that the law is "found" rather than "made" to conclude that prospective decision-making is dangerous; a process in which unless absolutely necessary only the legislature, not the courts, should indulge.

The Court recognized this in *Linkletter v. Walker*, 381 U.S. 618, 628 (1965), when it authorized limitation of a decision to prospective effect only "where the exigencies of the situation require" and "in the interest of justice."

As Professor Mishkin has written, prospectivity "seems to involve an arbitrariness which is normally seen as inconsistent with judicial action."[5] See *Adams v. Illinois*, 405 U.S. 278 (1972) (opinion of Douglas, J., and Marshall, J.); *Mackey v. United States*, 401 U.S. 667, 675, 679 (1971)(opinion of Harlan, J.). The very arbitrariness of particular cut-off dates chosen in prospectivity cases, coupled with the widely accepted belief that several prospectivity decisions were, in fact, solely based on practical considerations, creates an appearance of courts acting as legislative bodies when decisions as to retroactivity are confronted—with all the potential strain that such an appearance creates. The strain will be all the greater if the government's position in this case is sustained, for this Court has never before "applied new rules announced in habeas corpus cases retroactively" (458 F.2d at 556).

There are, of course, constitutionally acceptable occasions for the invocation of the power to restrict the retroactive effect of judicial decisions, but this is a power to be used sparingly. Although the symbol of impartial and impersonal fidelity to pre-existing law is not always accurate, abandoning it in favor of a general power of non-retroactive overruling would put the courts in the highly undesirable and politically vulnerable posture of

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[5]Prospective law-making is generally equated with legislation. Indeed the conscious confrontation of an effective date . . . smacks of the legislative process; for it is ordinarily taken for granted . . . that judicial decisions operate with inevitable retroactive effect. Beyond that, explicit treatment of the question, particularly if a definite time is set for transition from one rule to another highlights the fact that the court has changed the law. Mishkin, *Foreward: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 65, 66 (1965).

overtly legislating. See Schwartz, *Retroactivity, Reliability and Due Process*, 33 U. of Chi. L. Rev. 719, 720 (1966). An extension of the ambit of prospective-only decisions would, moreover, weaken the capacity of the courts to frame general rules of decision:

> A theory of selective retroactivity raises the spector of continuous controversy over the soundness of its application. (Schwartz, *id.* at 724.)

Given the "strong tendency to universalize ethical judgments, any application of different rules to persons similarly situated—when the rules embody ethical values—tends to impair the image of justice, and to undermine public confidence in the administration of law and the rule of law itself." Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201, 239 (1965). Far from mechanically applying the traditional rule of retroactivity, as the government characterizes the decision of the court below, the court of appeals responded to institutional considerations of the highest order.

Until the ruling in *Linkletter v. Walker* (381 U.S. at 628) that the Court "may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application . . .", new constitutional decisions had consistently been applied retroactively. *Linkletter* conceded that "heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule." At common law "[t]here was no authority for the proposition that judicial decisions made law solely for the future" (*Id.* at 622, 628).

Both common law and American traditions reserved a special place for jurisdictional transgressions, *Ex parte Siebold*, 100 U.S. 381 (1879); *Ex parte Reed*, 100 U.S. 13 (1879); *Developments in the Law of Habeas Corpus*, 83 Harv. L. Rev. 1038, 1209 (1970).[6] If a body lacked jurisdiction over the subject matter or the parties, its purported judgments were void. A decision of a court without jurisdiction could no more be allowed to stand than a decision of a kangaroo court. In *McClaughry v. Demings*, 186 U.S. 49 (1901), for example, a volunteer officer was tried by a Regular Army court-martial despite the fact that the Articles of War expressly forbade a Regular Army court-martial. Even though the court sat in a military courtroom with all the accessories necessary for a valid trial, this Court voided the conviction saying:

> His consent could no more give jurisdiction to this court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians. . . . (*Id.* at 66.)

When, beginning with *Linkletter*, the Court denied retroactivity to cases in which courts "failed to exercise their power in a proper manner" (*Flemings, supra* 330 F. Supp. at 195), it said nothing which implied that a court without adjudicatory power could convict. A review of the cases in which this Court has held new constitutional rulings non-retroactive strongly suggests that the Court has limited the application of this power to a particular class of procedural decisions.[7] None of these cases, of

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[6]According to Bacon: "If the commitment be against the law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge." IV Bacon, Abridgment of the Law, Habeas Corpus 585.

[7]For example, *Linkletter v. Walker, supra*, dealt with illegal searches by the police, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Tehan*

course, touch the question of the adjudicatory authority of the lower court:

> Generally, prospectivity has been used when a court with apparent jurisdiction has utilized some procedure or evidence theretofore thought proper.... By contrast, the question of lack of subject-matter jurisdiction has been considered unwaivable—to be raised at any point in the litigation and on the court's own motion. (*Flemings, supra* 330 F. Supp. at 201.)

The Court, moreover, has declared the denial of certain rights to be so prejudicial to the defendant that new

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v. Shott, 382 U.S. 406 (1966), holding *Griffin v. California*, 380 U.S. 609 (1965), prospective, involved comments by the prosecutor and/or judge; *Johnson v. New Jersey*, 384 U.S. 719 (1966), held that *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), only applied to confessions used in trials begun after the date of those decisions; *Stovall v. Denno*, 388 U.S. 293 (1967), held the identification rules set up in *Gilbert v. California*, 388 U.S. 263 (1967), and *United States v. Wade*, 388 U.S. 218 (1967), to be prospective; *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), dealing with the accused's right to trial by jury, were held prospective in *DeStefano v. Woods*, 392 U.S. 631 (1968). *Lee v. Florida*, 392 U.S. 378 (1968), and *Katz v. United States*, 389 U.S. 347 (1967), which involved illegal interception of letters and wiretapping, were declared prospective in *Fuller v. Alaska*, 393 U.S. 807 (1968), and *Desist v. United States*, 394 U.S. 244 (1969). In *Williams v. United States*, 401 U.S. 646 (1971), the Court declined to hold *Chimel v. California*, 395 U.S. 752 (1969), retroactive. In *Adams v. Illinois*, 405 U.S. 278 (1972), the Court declined to hold *Coleman v. Alabama*, 399 U.S. 1 (1970) retroactive. The *Mapp, Escobedo, Miranda, Gilbert, Wade, Lee, Chimel,* and *Katz* decisions dealt only with the admissibility of evidence. Neither *Coleman, Duncan* nor *Bloom* questioned the right of the courts to try the defendant, only the necessity of counsel at preliminary hearings, or of providing jury trial in those courts.

rulings must be retroactive. In cases involving right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Mempa v. Rhay*, 389 U.S. 128 (1967)), use of a co-defendant's confession (*Bruton v. United States*, 391 U.S. 123 (1968)), and exclusion of jurors opposed to the death penalty (*Witherspoon v. Illinois*, 391 U.S. 519 (1968)), the Court rejected prospectivity because of the effect of the prior rule on the fact-finding process. The court of appeals thought that "if some decisions which were not based upon concepts of jurisdictional competence have been applied retroactively . . . *a fortiori* a case which rests on lack of jurisdiction in the traditional sense and seeks to preserve the basic integrity of the institutions which enforce our criminal laws, must be so applied." (458 F.2d at 551.)

In *United States v. United States Coin and Currency*, 401 U.S. 715, 723 (1971), the Court found a new rule retroactive because it dealt with conduct that could not "be punished in the first instance":

> Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the fact-finding process.
>
> Indeed this conclusion follows *a fortiori* from those decisions mandating the retroactive application of those new rules which substantially improve the accuracy of the fact-finding process.

In *Coin*, the Court decided that *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), reversing convictions because of the unconstitutionality of the underlying law, applied retroactively to bar a forfeiture of gambling receipts:

> In the case before us, however, even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity. (401 U.S. at 724-26.)

O'Callahan v. Parker involves an analogous situation for it is based on unconstitutionality of the law which gives the court-martial jurisdiction over the crime. Following *Gosa v. Mayden, supra*, the government attempts to distinguish *O'Callahan* from *Coin* by arguing that the latter involves

> A form of conduct that could not have been constitutionally punished at any time from and after the date of the Bill of Rights. (*Gosa*, 450 F.2d at 758.)

While allegedly the issue in *O'Callahan*

> is not whether the accused could be tried at all, but which forum had the right to conduct the proceedings. (*Id.* at 759.)

But this distinction is paper thin. The issue in *O'Callahan* was not merely "which forum had the right to conduct the proceedings," but whether or not "the accused could be tried at all" by the distinct and substantially different system of military courts. Certainly *Coin* and *O'Callahan* are far closer to each other than either is to the usual retroactivity case involving procedural rules. As Judge Weinstein read *Coin*, it involved a situation "closely akin to subject matter jurisdiction":

> In *United States Coin* the conduct was immune from punishment in any court while in the instant case the conduct was punishable but not in this

particular court. Both cases involve the power–jurisdiction–to act. (*Flemings, supra* 330 F.2d at 202.)

In the same vein is *North Carolina v. Pearce*, 395 U.S. 711 (1969), holding retroactive the *Benton v. Maryland*, 395 U.S. 784 (1969), "incorporation" of the Double Jeopardy Clause of the Fifth Amendment in the Fourteenth without discussing the *Linkletter* doctrine.

The government unpersuasively attempts to analogize the difference between military and civil courts to the difference between state and federal courts. But military courts are a special system of justice, separate and apart from both federal or state judicial systems. The military courts do not, for example, have jurisdiction over a violation of either state or federal law, except within a sphere limited by the Constitution. This Court has consistently found that the military law system is not a part of the Article III judicial system.[8]

The government places its main reliance on a civil case, *Chicot County Drainage District v. Baxter State Bank*,

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[8]It must be emphasized that every person who comes within the jurisdiction of a court martial is subject to military law–law that is substantially different from the law which governs civilized society. *Reid v. Covert*, 354 U.S. 1, 38 (1957).

* * * * *

[I]t had long been established that military tribunals are not part of our judicial system. *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1940); *Ex parte Vallandigham*, 1 Wall. 243 (1863).

* * * * *

We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of people charged with offenses for which they can be deprived of life, liberty or property. (*O'Callahan, supra* at 262.)

308 U.S. 371 (1940). In *Chicot*, bondholders of a state drainage district who had been parties to a debt adjustment proceeding sought to recover on the original bonds on the ground that the statute authorizing the adjustment had been subsequently declared unconstitutional. In ruling against the bondholders, this Court explicitly confined "consideration to the question of res judicata . . ." (*Id.* at 375). The Court barred the bondholders' suit because to do otherwise would have adversely affected the rights of neutral third parties who had innocently bought bonds under the approved debt adjustment plan. These subsequent bondholders had relied in good faith on the prior decision. Their property rights had vested. It would have been "strikingly unjust" (458 F.2d at 551), as well as totally inconsistent with settled principles of res judicata, to change their status

The present case is noticeably different. Respondent contends that the government transgressed constitutionally set jurisdictional limits when it convicted him of a criminal offense and subjected him to confinement and stigma. No innocent third party or vested private property rights would be adversely affected by retroactivity. As the court below put it: "*Chicot* was a civil proceeding concerned simply with whether a debt was still owing. Although the doctrine of finality bears an important place in the jurisprudence of criminal law . . . it is 'more firmly settled in the context of civil litigation.' " (458 F.2d at 551)

Nevertheless, Flemings does not contend that under no circumstances can the doctrine of *Linkletter* be applied to jurisdictional questions. Rather, he argues that the terms and conditions of such application "are among the most difficult of those which have engaged the attention of the courts," *Chicot County Drainage District, supra* at

308 U.S. 374, that such a step is so at odds with traditional ways of doing things and accepted perceptions of the nature of law, so fraught with fundamental institutional considerations, that this Court should not enter upon such a course unless plainly required by the "exigencies" to do so. (See the dissenting opinion of Judge Godbold in *Gosa, supra*, 450 F.2d at 767-69.)

This Court has not hesitated in the past to order the full retroactive application of decisions limiting the jurisdiction of courts-martial. *Kinsella v. Krueger*, 354 U.S. 1 (1957), involved the court-martial conviction of the wife of an Army colonel for a 1952 murder. Her military appeal became final on December 30, 1954. See *United States v. Kinsella*, 137 F. Supp. 806 (1956). Yet the Court applied its decision in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), retroactively and permitted a writ of habeas corpus to issue. See also *Grisham v. Hagan*, 361 U.S. 278 (1960). Respondent submits that in the absence of compelling circumstances not shown by the government in this case the traditional policy governing the retroactivity of jurisdictional rules must be applied to *O'Callahan*.

II.

PRINCIPLES FORMULATED TO DETERMINE THE RETROACTIVITY OF NEW PROCEDURAL RULES REQUIRE THAT *O'CALLAHAN v. PARKER* BE HELD RETROACTIVE.

Should this Court determine that the jurisdictional basis of *O'Callahan* is not sufficient to mandate its retroactive application, it would be guided by those rules laid down in cases subsequent to *Linkletter, supra*, in determining whether the interests of justice require restriction of the decision to prospective application.

Those standards which have been most frequently applied are found in *Stovall v. Denno*, 388 U.S. 293, 297 (1967):

> The criteria guiding resolution of the question [prospective application] implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

A. The Purpose To Be Served by the New Principle

The most important of the three criteria is the first. When a rule's predominant purpose is to ensure the fairness of trial, the integrity of the fact finding process, or to avert a "clear danger of convicting the innocent," *Tehan v. Shott*, 382 U.S. 406, 416 (1966), the rule must be applied retroactively, regardless of reliance on the old standard or the effect of retroactive application of the new rule on the administration of justice. *Williams v. United States*, 401 U.S. 646 (1971); see also *Desist v. United States*, 394 U.S. 244 (1969).

The government, in support of its contention that *O'Callahan* did not question the reliability or fairness of court-martial adjucications, places primary reliance upon the refusal of the Court to apply jury trial cases, such as *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), retroactively. See *DeStefano v. Woods*, 392 U.S. 631 (1968). The heart of the Court's rationale for such refusal, and the heart of the government's contention here, is contained in the following language from *Duncan, supra*:

> We would not assert, however, that every criminal trial—or any particular trial—held before a judge

alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. (391 U.S. 631, 633-34 (1968).)

But *Duncan*, *Bloom* and *DeStefano*, even read in the light most favorable to the government, simply do not control *O'Callahan's* retroactivity. Flemings' complaint is not directed to the identity of the body before which he was *not* tried, but rather to the nature of the body before which he *was* tried. He relies, in short, upon what the Fifth Circuit in *Gosa, supra*, called the *O'Callahan* right "to avoid numerous incidents and functions of military justice considered less satisfactory to the determination of guilt than procedures available in civilian courts" (450 F.2d at 763). *DeStefano* says nothing with respect to the "integrity" of the fact-finding system under which Flemings was tried, for he was not tried before a judge or in a civilian court.

Flemings was tried before a 1944 Navy court-martial, and, as we shall demonstrate, 1944 Navy courts-martial in no way resemble trial before a civilian judge. The many reforms of the Uniform Code of Military Justice, heavily relied upon by the government in this case, merely set in relief the character of courts-martial as they existed prior to the 1950 enactment of the Code. Respondent does not claim that without exception every adjudication by courts-martial as constituted prior to 1950 violated due process but he does contend that the procedures governing such courts-martial "raised a clear danger of conficting the innocent," *Tehan v. Shott*, 382 U.S. at 416, and "serious questions about the accuracy of guilty verdicts in past trials," *Williams v. United States*, 401 U.S. at 653.

An accused tried before a 1944 Navy court was tried by a body of officers hand-picked by the very official

who made the decision to prosecute, and hand-picked from among that officer's subordinates and underlings. One of the witnesses before a subcommittee of the House Armed Services Committee (now a distinguished federal judge), during the Committee's 1949 hearings on the proposed Uniform Code of MIlitary Justice, compared such panels to a jury "appointed out of the sheriff's office or . . . appointed out of the public prosecutor's office. . . ."[9]

If an accused tried for a non-service-connected crime was at the same time also charged with a service-connected crime (as in the present case), this group was hand-picked by the man who was in a very real sense the "victim" of the service-connected crime—the accused's commanding officer, whose orders had been flouted and whose disciplinary control over his unit were threatened by the accused's service-connected crime.

Before subordinate officers[10] took their places as members of the court-martial panels, each had an ample opportunity to learn the views of his superior officer with respect to the offender and the offense.[11] Each knew

[9] Testimony of Fredrick van Pelt Bryan, Chairman, Special Committee on Military Justice of the Association of the Bar of the City of New York, and former deputy chief of staff of the Second Air Division of the Air Force. *Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess., at 630 (1949).

[10] As servicemen in 1944 did not have the right to demand that enlisted members be represented on a court-martial panel, the government's claim that a member of the armed services was entitled to a determination by a representative jury of his military peers is plainly insubstantial insofar as it relates to respondent Flemings.

[11] The system of military justice laid down in the Manual for Courts Martial not infrequently broke down because of the denial to the courts of independence of action, in many instances by the

full well, for example, what his superior officer's views were about "coddling" of AWOL's. There was plenty of opportunity to express these views–at staff conferences, over morning coffee in the mess hall, and even around the bar at the officers' club.[12] Each officer took his place on the court-martial knowing that his own efficiency report, including, in 1944, that aspect of "efficiency" which related to performance as a court member, was to be judged by that same superior officer, the one who had preferred the charges and who was, in many cases, also the "victim."[13]

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commanding officer who appointed the courts and reviewed their judgments; and who conceived it the duty of command to interfere for disciplinary purposes. Indeed, the general attitude is expressed by the maxim that discipline is a function of command. *Hearings on H.R. 2498, supra* note 9, at 634, 635. The quote is from the famous Vanderbilt Report.

[12]Testimony of Arthur E. Farmer, Chairman, Committee on Military Law of the War Veterans Bar Association:

> When I was down at Camp Gordon and it was done in one instance very beautifully by putting the officer under arrest by written orders instead of the usual way which is by word of mouth.
>
> The court could not have been more influenced if each and every officer was called before him and told, "Look, this man is guilty and make an example of him." In other instances, . . . there is a heart-to-heart discussion between the general and his operations staff officer.
>
> They discuss the seriousness of the offense, in the hearing of a couple of other officers, and the Army grapevine which functions so beautifully goes into action, and every member of the court knows about it.

Hearings on H.R. 2498, supra, note 9 at 608.

[13]Consider the following:

(1) Testimony of Edmund M. Morgan, a prominent authority on military law, and one of the principal drafters of the Uniform Code of Military Justice: "For instance, Governor Gibson, of

In a civilian court, a defendant faced with a jury thought to be biased would have had available

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Vermont, was very wroth at the treatment he had received as a member of a court-martial, being called in by the commanding officer and reprimanded. And when Mr. Gibson told him that he was a lawyer and that they could not tell him how to decide cases, that the choice was to get him off the court or let him use his conscience on the case, they got him off the court." *Hearings on H.R. 2498, supra* note 9, at 608.

(2) Testimony of George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association:

> . . . The present bill says that the unauthorized influencing of a court is prohibited.
>
> Now if anybody will tell me or tell a commanding officer where the line is to be drawn between authorized and unauthorized influencing of a court, I would be very glad to have it. I do not know.
>
> But I do know from experience in two wars that without violating a comma of Article 37 I, as a commanding officer, could get any verdict I wanted from any court chosen from my command.
>
> When the Vanderbilt Committee interviewed among others 49 general officers—and I think my figures are accurate—16 of those general officers affirmatively and proudly testified that they influenced their courts.
>
> They regarded it as part of their duty. How many of the remaining 33 actually did it, I do not know.

Hearings on H.R. 2498, supra note 9 at 719.

(3) Letter received by Col. John P. Oliver, JAG, Reserve, received by him while serving in Europe (as read before the House Subcommittee):

> Headquarters, . . . Corps
> Office of the Commanding General
> APO . . . , U.S. Army
>
> 12 May 1945
>
> Subject: Inadequate sentence of court
> To: Lt. Col. John P. Oliver, Headquarters
> 1. I have read a summary of the testimony in the case of Private . . ., . . .th Signal Battalion and am not pleased with the

peremptory or for cause challenges. But if a military defendant were tried before an Army court, he would have had one peremptory challenge [14] and if he were in the Navy, he would have had none.[15] Flemings was in the Navy. In either service, an accused could submit as many for cause challenges as he chose, but he could only submit them one at a time. The determination as to whether or not cause for challenge existed was made by the other members of the panel.[16] They decided such questions by a majority vote, with a tie meaning retention of the challenged member. A system whereby the challenged member's brother officers (all chosen by that same commanding officer who might at the same time be writing their efficiency reports) made the

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outcome. I do not consider the court to have performed its duty.

2. The decision of the court is the decision of all its members FOR WHICH ALL MUST BE HELD ACCOUNTABLE. It would seem the court undertook to determine whether this man should have been tried by general court rather than a determination of his guilt or innocence from the evidence. Then, after finding him guilty of offenses warranting severe punishment, only a minor sentence was imposed. It is not my intention, when a case is referred to a general court martial that any sentence imposed be one which a special court martial might have given. I desire in the future that this be kept in mind.

. . . . . .

Major General, U.S. Army, Commanding

[Emphasis added.] *Hearings on H.R. 2498, supra* note 9 at 786.

[14] *Manual for Courts Martial*, Ch. XII, §58(a), United States Army (1928).

[15] Note, *The Proposed Uniform Code of Military Justice*, 62 Harv. L. Rev. 1377, 1380 (1949).

[16] *Naval Courts and Boards*, Ch. IV. §391 (1937). (This was the Navy equivalent to the *Manual for Courts Martial.* The 1937 edition was in effect at the time of respondent's court-martial.)

determination as to whether or not their associate was biased, must have inspired less than confidence in an accused who felt that the panel had been loaded against him.

The challenge procedure, as well as the rest of the defense, could be conducted either by the accused himself or, if he were fortunate, by the accused's "counsel," also selected by the same commanding officer.[17] Although the term "counsel" appears in this record, the person who represented Flemings in 1944 need not have ever opened a single law book. "Counsel," in 1944, was merely the Navy's term for any officer who had been assigned to assist the accused at trial. There was no requirement that this "counsel" have had any sort of legal training whatsoever.[18] Indeed, there was no requirement that any member of the court have had legal training.

Although at the time it was presumably contemplated that any Navy officer would have been exposed to at least a few briefings on the Navy court-martial system, one can be skeptical as to whether in a period of "ninety day wonders," even these would actually have been given. One can also be somewhat dubious as to the extent to which commanding officers went out of their way to assign as defense counsel men who had proved themselves even the least bit competent at some other task.[19] Under the Uniform Code (and the government's analysis of

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[17] *Naval Courts and Boards*, Ch. IV, §357 (1937).

[18] *Naval Courts and Boards*, Ch. IV, §358 (1937).

[19] *Testimony of Fredrick van Pelt Bryan, supra* note 9 at 623: "The selection of defense counsel was often done haphazardly and I am frank to say to you gentlemen from my own experience in many cases you went over the list of officers and you suddenly found a fellow over here who was not doing much and you said,

military justice procedures is based almost entirely on the Code) the criticism has been heard that counsel is transferred to the prosecution of cases at the least sign of success or competence, but Flemings was not even accorded the protection of a right to counsel, now available to servicemen by the Code.

Even should an accused have been lucky enough to have been assigned "counsel" capable of presenting an adequate defense, his lawyer might have found his opportunities for so doing somewhat limited by the naval procedure for obtaining defense witnesses. In 1944, the pertinent provision read as follows:

> The judge advocate shall summon as witnesses persons whose testimony is necessary to a trial, whether for the prosecution or the defense; but shall not, except as hereinafter provided, summon any witness at the expense of the United States.[20]

One is apt to miss the full flavor of this arrangement unless it is realized that "judge advocate" was the naval term for prosecutor.[21]

Even should defense counsel, after patiently explaining the strategies of the anticipated defense to his opponent, have convinced him to subpoena a particular witness, there would still be the problem presented by the following provision:

> The judge advocate is not authorized to subpoena as a witness, at the expense of the United States, any civilian who is not within the territorial limits in

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'We can spare him and we can throw him in as defense counsel, he won't have much to do.' " *Compare Gideon v. Wainwright*, 372 U.S. 335 (1963).

[20] *Naval Courts and Boards*, Ch. IV, §245 (1937).

[21] *Id.* at Ch. III, §§351, 421 (1937).

which the court can compel attendance, even though such witness be considered a material one and be willing to attend. In such cases the judge advocate shall forward the subpoena to the Secretary of the Navy. . . .[22]

The procedures for obtaining defense witnesses were particularly inadequate where, as in Flemings' case, the Navy without explanation transferred the trial to a state where none of the potential witnesses lived. A naval court could not subpoena civilian witnesses from outside the state where the court was sitting.[23] Had petitioner been tried before a civil court, such court would have had access to potential defense witnesses.

Upon the completion of whatever defense an accused's command-picked, probably untrained, defense counsel could muster, the panel of officers would retire to make their decision. It should be noted, however, that this might not be the same panel which had heard the initial parts of the case. The convening authority had the power to replace sitting members, or to appoint new members, during the course of the trial.

Apparently, there have been few complaints of abuse of this particular power.[24] Perhaps with the opportunities to exercise influence already described, few convening authorities felt it necessary to be quite this blatant. Even as late as 1960, however, under the Uniform Code, there still existed convening authorities who felt it their prerogative to remove a whole panel, if that panel was

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[22] *Id.* at Ch. III, §248.

[23] *Articles for the Government of the Navy*, Art. 42(b) (1939).

[24] *Compare United States v. Whitley*, 5 U.S.C.M.A. 786, 19 C.M.R. 82 (1955).

thought to have shown undue leniency in preceding cases.[25]

This Court in *O'Callahan* criticized the military procedure whereby only two-thirds of a hand-picked panel is necessary for conviction.[26] At the time Flemings was tried the situation was even worse for Navy defendants. After a trial by a command-appointed prosecutor, before a command-appointed court, where a command-appointed defense "counsel" would be required to go through the prosecution to obtain witnesses, the prosecution needed only a bare majority for conviction.[27]

The foregoing is a bare bones outline of the naval court-martial system as it existed when petitioner was tried. No simple outline, though, can recreate the full flavor of a judicial system, however fair the formal structure, attempting to function within a closed military society, under the smothering supervision of officers holding, in wartime, literally life and death power over the fates of the various participants. In this situation, and given the often ingrained responses of career military men to the even faintly expressed desires of higher rank, justice has occasionally faltered even under the highly touted reforms of the Uniform Code. It must continually be borne in mind that Flemings was not tried under the Uniform Code, but instead under the Articles for the Government of the Navy as they existed in 1944.[28]

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[25] *United States v. Williams*, 11 U.S.C.M.A. 459, 29 C.M.R. 275 (1960).

[26] *O'Callahan, supra* at 263, 264.

[27] *Naval Courts and Boards*, Ch. III, § 425 (1937).

[28] Consider the following excerpt from the Report of the War Department Advisory Committee on Military Justice: "The committee is convinced that in many instances the commanding

This Court, however, does not need respondent's brief to set before it the nature of the court-martial system. That picture has already been painted—by the Court's opinion in *O'Callahan v. Parker*. The government contends that that opinion did not reflect upon the integrity of the military fact finding process. This is wishful thinking. The defects already referred to are the

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officer made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice but its prevalence was not denied and indeed in some instances was freely admitted. The close association between the commanding general, the staff judge advocate, and the officers of the division made it easy for members of the court to acquaint themselves with the views of the commanding officer. Ordinarily in the last war a general court was appointed by the major general of a division from the officers in his command, and in due course their judgment was reviewed by him. Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general who had no power to increase a sentence, might fix it to suit his own ideas. . . ." *Hearings on H.R. 2498, supra* note 9, at 647.

(2) Report of the Committee on Military Justice of the New York Lawyers Association: "The Secretary of War and the Secretary of the Navy each appointed boards of distinguished citizens to review the court-martial systems of their respective services, and to make recommendations for a thoroughgoing revision of military and naval justice. The famous Vanderbilt report, made to Secretary Patterson, and the Ballantine and Keefe reports, made to Secretary Forrestal, all found substance to the charges which had been leveled at the court-martial systems, and presented definitive recommendations for the elimination of the conditions which made such charges possible.

"The jugular vein at which all such boards aimed their recommendations was the domination and control of the court martial systems by command." *Hearings on H.R. 2498, supra* note 9, at 634.

same ones to which the Court pointed when it quoted the following language from *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955):

> . . . [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the kind of qualifications that the Constitution *has deemed essential to fair trials of civilians* in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. . . . [F]rom the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals. (*O'Callahan, supra* at 262, 263.) (Emphasis added.)

The command influence specter, which arose again and again in the House hearings on the Uniform Code, and which was considered a menace to military justice by the representative of the American Legion,[29] was precisely what the Court was referring to when it cited the following language, again from *Toth:*

> A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two thirds vote. The presiding officer at a court-martial *is not a judge whose objectivity and independence are protected by the judicial tradition,* but is a military law officer. . . .

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[29]Testimony of John J. Finn, Judge Advocate, District of Columbia Dept. of the American Legion, *Hearings on H.R. 2498, supra* n. 9, at 684.

> Substantially different rules of evidence and procedure apply in military trials. Apart from these differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger. (*O'Callahan, supra* at 263, 264.) (Emphasis added.)

Presumably, when the Court used the following language, it meant that language to have some reflection upon the integrity of the military fact finding process–indeed, it is practically impossible to read the language as not so intended:

> A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.... As recently stated: "None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." (*O'Callahan, supra* at 266, quoting Glasser, "Justice and Captain Levy," 12 Col. Forum 46, 49 (1969).)

To read this language, and then to determine, as did the *Gosa* court, that the words chosen by the Court in *O'Callahan* represent "no clear danger of convicting the innocent" ignores precisely the point at which the whole *O'Callahan* opinion seems to be driving:

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the

> world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. (*O'Callahan, supra* at 265, quoting from *Toth v. Quarles, supra* at 22.)

If this language, and the other excerpts from *O'Callahan* cited earlier, do not raise "serious questions about the accuracy of guilty verdicts in past trials," *Williams v. United States*, 401 U.S. at 653, it is difficult to suggest language that the Court could have used which the government would interpret as raising such questions.

The government relies upon the refusal of *DeStefano, supra*, to apply *Bloom v. Illinois, supra*, retroactively. *Bloom* held that the right to jury trial extends to trials for serious criminal contempts. Certainly *some* of the dangers which *O'Callahan* discussed with respect to courts-martial would also be present in the *Bloom* situation. Despite his status as the victim of a particular contempt, however, a civilian judge is still a judge, trained from the start of his professional career in the traditions of our legal system, including the presumption of innocence, the need for proof of guilt beyond a reasonable doubt, and, perhaps most important of all, the need for judicial decisions untainted by personal animosities or outside influence. On the other hand, "[t]he presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer." *O'Callahan, supra* at 264. Of course, the military law officer, found by *O'Callahan* to lack the requisite independence of a civilian judge, had not even been created at the time of Flemings' trial. The judicial functions were split between the "judge advocate",

whose primary function was to act as the prosecutor, and the court-martial panel itself, hand-picked by the officer who also made the initial decisions to prosecute.

There has been considerable controversy about the extent to which the faults of military justice set forth in *O'Callahan* are still dominant in courts-martial held under the Uniform Code (as were those of petitioners in *O'Callahan* and *Gosa*). Such controversies need not be resolved in this case. There has been precious little suggestion, in the congressional hearings previously cited, in court decisions, or in the academic comment upon military justice, that the biases of which Flemings complains did not infect the court-martial system in the pre-Code period when he was tried. And these biases plainly affect the "integrity of the fact finding process." *Cf. Stovall v. Denno*, 388 U.S. 293 (1967). In short respondent submits that the rule of *Williams v. United States* requires that Flemings be accorded the benefits of *O'Callahan*.[30]

(B) Reliance

Although under the *Stovall* test, the purpose of the "new" standard is controlling, the other two factors, "the extent of the reliance by law enforcement authorities on the old standards," and the "effect on the administration of justice of a retroactive application of the new

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[30] Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function . . . the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances. (401 U.S. at 653 (1972).)

standards" hardly suggest that prospective–only application of *O'Callahan* is in the interests of justice.

The old rule involved in *Linkletter* was that of *Wolf v. Colorado*, 338 U.S. 25 (1949), which was overruled by *Mapp v. Ohio, supra.* The reliance aspect discussed in *Linkletter* was heavily emphasized as being the states' reliance upon Supreme Court decisions which "again and again . . . gave . . . implicit approval to hundreds of cases in their application of its rule." (381 U.S. 637.) It would appear, therefore, that for the government to rely on this criteria it would have to point to a specific decision by the Court that has suddenly been overruled. There is no such decision.

The government argues that prospective application is also available when a decision, while not specifically overruling a prior Court decision, does make serious revisions in long-standing practices of the allegedly relying authority. But this Court pointed out in *O'Callahan* that whatever military jurisdiction has been exercised over "civilian" offenses in the Twentieth Century has itself been a departure from centuries of English and American law and custom. *O'Callahan* traced the principle back at least as far as the Seventeenth Century. There have apparently also been many instances where the findings and sentences of courts-martial have been overturned by military reviewing authorities precisely because the offense in question was exclusively one against the civil law. [31]

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[31] Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Van. L. Rev. 435, 446 (1960), citing Winthrop, *Military Law and Precedent* 1124 (1896).

In addition to early American military precedent referred to by the Court in *O'Callahan*, there is also considerable doubt as to the extent to which the military has relied upon the claimed authority *since* World War II. National policy has long favored delivery of servicemen who committed offenses against civilians to the states. See Brief of the United States at p. 26 in *O'Callahan, supra*. In 1955, the Departments of Defense and Justice entered into an agreement that federal offenses which occurred on-post would be subject to Defense Department jurisdiction while off-post federal offenses would fall within the jurisdiction of the Justice Department:

> The Department of Justice and Defense have found it desirable to establish ground rules for trying a serviceman charged with a civil offense in violation of both military and federal law. In general, these rules, which were established by agreement between the Departments in 1955, give to the military department concerned the responsibility of investigating and prosecuting offenses committed by persons subject to the Uniform Code of Military Justice and involving as victims only those persons or their civilian dependents residing on the military installation in question. (Duke and Vogel, *supra* n. 31, at 455, citing Army Reg. 22-160, Oct. 7, 1955, implementing *Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction* (July 19, 1955).)

From this Memorandum it would seem that, far from relying upon an allegedly broad pre-*O'Callahan* standard, the Department of Defense has for at least 18 years

employed as a matter of administrative policy the same test which *O'Callahan* later adopted.

The government also speculates that retroactivity may invalidate thousands of courts-martial conducted in reliance upon prior doctrine, but this contention is inconsistent with the government's representations to this Court in *O'Callahan*. In its brief, the government described "concurrent military jurisdiction" as "in practice, a residual jurisdiction . . . ." "Army Regulation . . . makes it army policy to deliver members to State and local civilian authorities for trial, upon request, unless the best interests of the service. . . . In fact, state and local authorities are more interested in taking jurisdiction over serious offenses and do so in the great majority of cases." Brief of the United States at pp. 26, 27.

(C) Effect on the Administration of Justice

The lack of general reliance by the military upon the supposed old standard becomes even more apparent when we examine the third *Stovall* factor, the "effect on the administration of justice of a retroactive application of the new standards." This is so because, if the "burden" is evaluated in terms of the number of retrials which will be required, or the number of situations where retrial is no longer practically possible, it would seem that the lesser the past reliance, the fewer will be the number of people who have been incarcerated under the old rule.

The figures available simply fail to bear out the government's claims as to the burdens which retroactivity will require. Taking a look at those cases tried in 1968 and 1969, prior to *O'Callahan*, the government's position would seem to suggest that a high number of these would have been reversed upon direct, post-*O'Callahan* review,

given the decision by the Court of Military Appeals to apply *O'Callahan* retroactively to cases still pending on direct review.[32] The contrary is the case. Approximately one percent of all general court martial cases tried before *O'Callahan* and appealed from June 2, 1969 until December 31, 1970, contained offenses that were non-service connected.

Cases appealed to Court of Military Appeals

June 2, 1969 – December 31, 1969:	555
January 1, 1970 –December 31, 1970:	983
	1538

Cases reviewed by Army Court of Military Review

June 2, 1969 – December 31, 1969:	1025
January 1, 1970 – December 31, 1970:	2420
	3445

From June 2, 1969 to December 31, 1970, on the basis of O'Callahan

Offenses set aside by Court of Military Appeals:	30
Offenses set aside by Army Court of Military Review:	16[33]

If these figures are representative of cases from earlier years, it would appear that the government is in error

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[32] *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *United States v. Smith*, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969); *United States v. Prather*, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969).

[33] Blumenfeld, *Retroactivity after O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L. J. 551, 580, n. 147 (1972).

when it anticipates large numbers of petitions for retroactive relief. In fact, the Solicitor General, during the oral argument in *Relford, supra,* informed this Court that *O'Callahan* had resulted in surprisingly few petitions involving the question of retroactivity.[34] In a press interview, the Army Judge Advocate General has apparently conceded that few petitions for review have resulted from *O'Callahan.*[35] There are some 4,000 men serving military prison sentences. As these are the men with the greatest interest in asserting *O'Callahan* rights, it is extremely significant that few have apparently thought their offenses not to be service connected. Three years after *O'Callahan* it is reasonable to predict that those men with *O'Callahan* claims who were imprisoned before 1969 would have raised them. In short, the available evidence indicates that a relatively insignificant number of petitions for relief will be filed.[36]

The reasons for the comparatively small numbers of *O'Callahan* claims are relatively easy to spot. The primary factor is probably the previously mentioned agreements between the military and civil authorities limiting the military role in prosecuting off-base offenses. As a result, taking 1968 as an example, 90% of the servicemen accused of off-post rapes were tried by federal and state courts, as were 86% of off-post larceny cases, 95% of the off-post murders, 96% of off-post house breakings. In the same year, 94% of all motor vehicle violations and 85% of all narcotics cases were handled by the local

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[34] *Id.* at 578.

[35] *Id.* at 578, n. 142.

[36] *Id.* at 578-80.

authorities.[37] Additionally, many courts-martial involve only modest penalties and minimal confinement and thus are unlikely to present opportunities for litigation.

Another major factor limiting the number of cases which would be affected by retroactivity is the large number of courts-martial which involve crimes committed outside of the United States, a category of offenses that all agree is service connected. Of all offenses tried by general court-martial in 1970, for example, an estimated 31% involved acts committed in foreign jurisdictions; two-thirds of all civilian offenses tried by special courts-martial in 1970 were heard overseas.[38]

Finally, there is the fact that, of necessity, a huge proportion of the offenses punishable under the Uniform Code are plainly service connected—and easily determined to be such—because they (1) took place on a military base (*Relford, supra*) or (2) involved purely military offenses which would present no *O'Callahan* problems whatsoever. It has been estimated that for the years 1955 to 1964, respectively, 68% and 70% of the military caseload involved AWOL, desertion, and disobedience offenses.[39]

The government also claims that it will be difficult to obtain witnesses because servicemen are often transferred, but in non-service connected cases witnesses are likely civilians and more easily produced in their local civilian courts.[40]

[37] *Id.* at 580, n. 149. Blumenfeld's statistics are based on data compiled by the Record and Analysis Division of the Department of Defense.

[38] *Id.* at 580-81, n. 149.

[39] *Ibid.* Blumenfeld concludes that available data indicates that few finalized convictions involved non service-connected offenses.

[40] The social costs of retroactivity are likely mitigated by the fact that the discharge statutes that would be upgraded are notoriously counter-rehabilitative because they impede future

Even for those prior cases in which *O'Callahan* issues actually are involved *and* where defendants long since released take the trouble to seek correction of their discharge status, the burden will be far less than in the usual retroactivity situation. As pointed out by both courts below, Congress has already provided a procedure by which persons such as Flemings may apply for a change in their naval records. The Board for the Correction of Naval Records was established to entertain just such requests. It is authorized to revise discharge status and to order the return of forfeited pay. That Board "may correct any military record of that department when [it] considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a). Once the retroactivity of *O'Callahan* is judicially established, even cases of the sort Flemings has brought will be rendered unnecessary. The burden that he and those similarly situated will place on an administrative agency is precisely the burden which Congress has determined the agency should bear.[41]

Respondent believes that this Court cannot be but impressed that the Department of Defense—with all its employees, computers, and experts on military justice

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employment. *See* President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections*, Ch. VIII (1967).

[41] With respect to any alleged financial burden caused by retroactivity, it should be noted that most servicemen who are tried and convicted are enlisted men with relatively short military experience and few have served enough time in the Armed Forces to have become eligible for retirement benefits. "Army statistics for 1969-70 show that less than 1.5 percent of those convicted were ages 17-19; 60 percent were ages 20-24; 7.6 percent were ages 25-29 and 0.9 percent were ages 30-35. Only 0.4 percent were over 39 years of age." Blumenfeld, *supra*, at 574, n. 128.

with access to the facts—has failed to present to the the courts below or to this Court complete statistics demonstrating that retroactivity will present burdens of the sort which would begin to outweigh the interests in accurate fact finding on which *O'Callahan* was premised. As we read the government's brief, it seems to argue that simply because many men have been court-martialed, retroactivity problems will be intractable. But gross statistics are insufficient; they must be refined to deserve consideration.

Judge Weinstein concluded that "It is not clear how many men presently incarcerated are involved, but if they have been deprived of liberty by a body lacking power to do so, they should be released. Much of the administrative burden created by applications for more favorable forms of discharge may be handled by a Congressional adoption of a short statute of limitations or by administrative remedies." (330 F. Supp. at 202.) His view was echoed by a unanimous court of appeals: "*O'Callahan*, decided more than two years ago, has yet to stir an influx of litigation which threatens to overwhelm the floodgates." (458 F.2d at 555.) Given the plain procedural deficiencies in Flemings' 1944 Navy court-martial, the government must point to a probability that retroactivity will impair the administration of justice. This it has failed to do.

III. RESPONDENT WAS DENIED THE RIGHT TO TRIAL IN THE VICINAGE.

An additional consideration supports affirmance of the judgment of the court below.[42] Flemings contended in the courts below that he was denied the right guaranteed by Article III, Section 2, Clause 3 of the Constitution[43] to trial in the vicinage. As the question of the application of this provision to the military is of first impression, no issue of retoractivity arises with respect to it. O'Callahan committed his crime and had its trial in the territory of Hawaii. The question, therefore, of denial of the right to trial in the vicinage under the military system was not mentioned. Flemings, on the other hand, was transported to a state which had no connection with the offense for trial.

In Anglo-American law, the right to trial in the vicinage has been considered fundamental. As early as the Magna Carta, the King guaranteed to his subjects the right to trial in the vicinage:

> Assizes of novel disseisin, and of most d'ancestor, and of darrien presentment, shall not be taken but in their proper counties. (*Magna Carta*, ¶ ¶ 17, 18.)

One of the grievances mentioned in the Declaration of Independence was that the English were "transporting us

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[42] A prevailing party "may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the [lower] ... court," *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970).

[43] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

across the seas to be tried for pretended offenses. . . ." The right to trial in the state or district in which the crime was committed was included in every version of the Constitution. Congress apparently believed the right to be so fundamental that it was reiterated in the Sixth Amendment. When first proposed, the Amendment included only the right to trial by jury, but during the congressional debates Representative Livermore suggested the advisability of including the right to trial in the vicinage in the Sixth Amendment also. The change was adopted by voice vote without anyone speaking in disagreement. (1 Annals of Congress 785 (1789).)

The right is such an accepted part of our traditions that there is a paucity of cases discussing it, but had Flemings been tried in either New Jersey (where the automobile was stolen) or Pennsylvania (where it was transported), he would have had the right to a trial in the vicinage.[44] The Advisory Committee on the Rules of Criminal Procedure for the Courts of the United States defended the Rule 21 restriction of applications for change of venue to the defendant on the ground that "the defendant has a constitutional right to a trial in the district where the crime was committed." (Rule 21, n. 3, 18 U.S.C. (Appendix), at 4498.)

The military has recognized the importance of trial in the vicinage. In *Wade v. Hunter*, 336 U.S. 684 (1948), the Army transferred the defendant's case to a different command because of the fact that the command which had originally held him for trial had, because of the quick

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[44] *State v. Wyckoff*, 31 N.J.L. 65, 68-69 (Sup. Ct. 1864); *State v. Brown*, 1 N.J. Misc. 377, 378 (Sup. Ct. 1923); *Commonwealth v. Wojdakowski*, 161 Pa. Super. 250, 53 A.2d 851, 855 (Super. Ct. 1947).

advance of the battle lines, moved many miles from the site of the crime. The trial was transferred back to a court closer to that site. In that case, the government defended its actions as part of

> the policy of the American Army in Europe to accelerate prompt trials in the immediate vicinity of the alleged offense. (*Id.* at 687.)

If the fighting army in Europe could honor the right to trial in the vicinage in the middle of a war zone, there is little question that the Navy could have given Flemings a trial in Pennsylvania or New Jersey.

Justice Frankfurter, writing for the Court in *United States v. Johnson*, 323 U.S. 273, 275 (1944), suggested that prejudice is inherent in any trial outside the vicinage of the crime:

> Aware of the unfairness and hardships to which a trial in an environment alien to the accused exposes him, the Framers wrote . . . Article III, § 2, cl. 3. . . .

But the Court need not adopt a *per se* rule, requiring trial in the vicinage in every case. Judge Weinstein found that Flemings suffered prejudice to his right to mount an effective defense when the navy moved the trial to New York State.[45]

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[45] The case before us demonstrates the worth of this right. Here the court-martial proceeding was held in the Brooklyn Navy Yard and plaintiff was incarcerated prior to trial on an island in Long Island Sound. How could he be expected to mount an adequate defense so many miles from the actual locus of the alleged crime in central New Jersey or Pennsylvania? Certainly distance complicated what was, in any event, a difficult task. This factor is especially important since the Pennsylvania State Troopers may have had exculpatory information. (330 F. Supp. at 203.)

The automobile involved in this case had been stolen while it was parked on a street in Trenton, New Jersey. Flemings claims that he had been hitchhiking in Pennsylvania—in civilian clothes—when he was picked up by another sailor in the automobile; that he was merely a passenger; and that he was not aware that the vehicle was stolen. While the driver was absent visiting a friend and Flemings was waiting in the car, state troopers stopped to investigate. Flemings alleged that as they talked with him the troopers saw the other sailor running away and that a gas station attendant who the troopers interviewed shortly after the arrest corroborated that he was hitchhiking. Plainly then a trial far from the vicinity of the alleged criminal acts impaired his chances of producing evidence. There can be little doubt about this conclusion when it is recalled that a naval court could not, in 1944, subpoena civilian witnesses from outside the state where the court was sitting. See n. 22, *supra*.

In addressing the question of denial of the right to trial in the vicinage in the courts below, the government conceded both the existence of a constitutional right to trial in the vicinage and that Flemings was not tried in the vicinage. The government contended, however, that the right is a requisite only of criminal trials in the civil courts. But servicemen are protected "from trials conducted in violation of express constitutional mandates," *United States v. Augenblick*, 393 U.S. 348, 356 (1969). See also *Burns v. Wilson*, 346 U.S. 137 (1953). Consistent with the Constitution, the armed services may not transfer a man hundreds of miles from the place where an alleged offense took place while at the same time depriving him of effective means to subpoena witnesses in his defense.

IV. RESPONDENT'S OFFENSE OF AUTO THEFT WAS NOT SERVICE CONNECTED.

The constitutional test of military jurisdiction, as set forth in *O'Callahan, supra,* and as refined in *Relford v. Commandant,* 401 U.S. 355 (1971), strongly suggests that a court-martial does not properly adjudicate charges that a serviceman stole a non-military automobile from the center of a large American city. When one applies the service connection test in light of the *O'Callahan* warning that the Constitution permits courts-martial to exercise jurisdiction only where "special needs" of the military justify that jurisdiction (395 U.S. at 369), it becomes clear that Flemings' alleged offense was not service connected.

As was the case in *O'Callahan,* Flemings' crime was not even remotely connected with his military duties. As was the case in *O'Callahan,* the crime alleged was not committed on or even adjacent to a military camp or enclave. In both that case and this, the civil courts were open and available. In both, the offense was committed, not at a far-flung outpost, not in the occupied zone of a foreign country, but within the territorial limits of the United States. If anything, the argument for civilian handling is even stronger here, where the offense was committed not in a territory but in a state.

In neither case were the "special needs" of the military involved in any way: "The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property." (395 U.S. at 274.) In *O'Callahan,* the Court stressed that the victim was not "performing any duties relating to the military." (395 U.S. at 273). Neither was the stolen automobile in this case used in the performance of any military duty.

Finally, as in *O'Callahan*, "we deal with peacetime *offenses*, not with authority stemming from the war power." (Emphasis added.) (395 U.S. at 273.) Auto theft has no inherent relationship to wartime military needs and nothing in the facts of the offense suggest that the Navy had a wartime interest in prosecuting it.

This leaves the sole distinction of *O'Callahan* the fact that petitioner was AWOL at the time of the offense. The court below held that this element is simply not enough to establish a "special need" of the military, given the *O'Callahan* principle that court-martial jurisdiction be limited to the least possible power adequate to meet its special purposes. In a case with "strikingly similar" (458 F.2d at 548, n. 11) facts to this, the Court of Military Appeals has held that the fact of improper absence does not confer military jurisdiction. *United States v. Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969). Indeed, that court found a lack of court-martial jurisdiction even where, in *Armes*, the offense was committed "to facilitate an escape from military confinement."

Two years after *O'Callahan*, the Court further considered the scope of "service connection" in *Relford, supra*, and set forth a list of twelve factors to be used as a guide in determining whether a particular crime was service connected.[46] The Courts below found that ten of

[46] (1) The serviceman's proper absence from the base. (2) The crime's commission away from the base. (3) Its commission at a place not under military control. (4) Its commission within our territorial limits and not in an occupied zone of a foreign country. (5) Its commission in peacetime and its being unrelated to authority stemming from the war power. (6) The absence of any connection between the defendant's military duties and the crime. (7) The victim's not being engaged in the performance of any duty relating to the military. (8) The presence and availability of a civilian court in which the case can be prosecuted. (9) The absence

these twelve factors (2, 3, 4, 6, 7, 8, 9, 10, 11 and 12) clearly point away from court-martial jurisdiction in the instant case and the government has not disputed this finding. Apparently, the government contends that the remaining two factors (1 and 5) are in and of themselves sufficient to establish court-martial jurisdiction.[47]

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of any flouting of military authority. (10) The absence of any threat to a military post. (11) The absence of any violation of military property. (12) The offense's being among those traditionally prosecuted in civilian courts. (401 U.S. at 365.)

[47] The second numbered factor, commission of the crime away from base, was clearly a major determinant of the outcomes in both *O'Callahan* and *Relford*. *Relford* especially emphasized the obvious military interest in preserving order on a military reservation and in insuring the safety of persons and property on such a reservation. There is no contention here that Flemings' acts even remotely affected the security of any military reservation.

There is likewise no suggestion that the crime was committed at a place under military control. (Factor three.)

The auto theft was committed in the State of New Jersey and was clearly within the competence of the New Jersey courts. Factor four thus points away from military jurisdiction.

There has been no suggested connection between the automobile theft and appellee's military duties. As he was AWOL at the time of the theft, there is very little likelihood that any such connection could exist. The sixth factor thus also points away from military jurisdiction.

There has been no suggestion that the owner of the automobile was at the time engaged in the performance of any duty relating to the military (factor seven). He has in fact stated that he was not so engaged. Furthermore, at the time of the court-martial the navy believed that the automobile was owned by a civilian, for Flemings was charged with theft from a civilian. (Factor seven.)

Respondent agrees with the government that the issue of service connection is not determinable by a mechanistic process of "factor counting." There may be situations where one of the twelve *Relford* factors alone will serve to establish service connection (*e.g.*, an off-post assault on a superior officer). But respondent submits that the only two factors applicable here, numbers one and five, simply do not establish any "special needs" of the military strong enough to overcome the heavily emphasized preference of *O'Callahan* for trial by civilian courts.

It should be noted that factor number one, authorized absence from base, if not present, in and of itself establishes a separate military crime–Absence Without Leave. This crime is clearly service-connected, and, when

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There has been no suggestion, nor could there be, that the civil courts of New Jersey or Pennsylvania were not open and available to hear the case (factor eight). The presence of a wartime situation, without more, does not operate to restrict the normal jurisdiction of the civil courts. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

Factor nine does not suggest military jurisdiction, as the theft of a private auto from an off-post area in no way operates to "flout" military authority.

The absence here of a threat to any military base (factor ten) also strongly points toward civil court jurisdiction.

Military property was not involved (factor eleven).

Unlike some offenses, such as disobedience to an officer, auto theft is traditionally and frequently dealt with by the civil courts, which courts have considerably more expertise in trying this sort of case than have courts-martial. Furthermore, civil courts have never shown any reluctance to handle auto theft cases. Factor twelve is thus the final of the ten factors pointing away from court martial jurisdiction.

combined with the President's power to regulate the length of permissible court-martial sentences, 10 U.S.C. § 856, clearly gives the military ample means to protect its undeniable interest in having troops present for duty when necessary, *cf. United States v. Armes, surpa.* The further use of improper absence to establish a military connection for otherwise "civilian" crimes would not give additional protection to the military's proper concerns, which are already fully protected by the undisputed power to punish for AWOL.[48]

As a district court has stated:

> . . . [T]he fact of leave is not a controlling element in *O'Callahan*. . . . The question of leave only emphasizes the fact that the crime was not committed within a military reservation, and that it probably involved a non-military victim. Leave merely gives the potential criminal the opportunity to enter the civilian community. Leave itself does not change the quality of the criminal act nor does its presence or absence change the fact that the crime itself is committed within a civilian community, involved if any a civilian victim and could be completely handled within the community

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[48] The government suggests that Flemings may have stolen a vehicle to facilitate his absence without leave, and that this circumstance converts the car theft into a service connected offense. But the record is barren of evidence supporting the government's claim. Flemings was arrested approximately two weeks after he failed to return to his base. It builds speculation on speculation to assert that he would have returned to his base had he not stolen a car. The "evidence does not indicate that Flemings was in any way indispensable to his unit, and the government's conduct in transferring him to Harts Island makes clear that his contribution to the war effort was not required."(458 F.2d at 548, n. 12.)

by an application of its own criminal processes. *Moylan v. Laird*, 305 F. Supp. 551, 557 (D. R.I. 1969).

See also *United States v. Crapo, supra* (AWOL and robbery and attempted robbery); *United States v. Castro*, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969) (AWOL and carrying of a concealed weapon); *United States v. Chandler*, 18 U.S.C.M.A. 593, 40 C.M.R. 305 (1969) (burglary and larceny while AWOL); *United States v. Armstrong*, 19 U.S.C.M.A. 5, 41 C.M.R. 5 (1969) (AWOL and murder).

The factor remaining, number five, is the fact that the theft was committed during wartime. Flemings concedes that where a crime has any impact upon the military, the magnitude of that impact may be increased if the military organization is at war. A crime which, for example, threatened the security of a military base, or the safety of military personnel or property might, if committed in wartime, have an enhanced impact upon the ability of the military to perform its mission. This is not the case, however, with an off-base theft of an auto on American soil. Whether committed in wartime, in peacetime, or in the state of *de facto* war which presently exists, military interests are simply not affected in any discernible manner unless special circumstances–not here alleged–connect the offense to the war effort.

If the government pointed to any significant connection between Flemings, his alleged theft, and the war effort, a different case would be presented. But *O'Callahan* and *Relford* require careful analysis of the relationship of an offense to authority stemming from the war power. On this record, no such relationship appears. The government's overbroad attempt to equate

wartime with service connection would mean, if accepted, that *O'Callahan* had absolutely no application so long as the United States was at war. Such a result is at odds with a long line of cases favoring civilian court jurisdiction when those courts are open and in the undisturbed exercise of their jurisdiction, *e.g., Caldwell v. Parker,* 252 U.S. 376 (1920); *Coleman v. Tennessee,* 97 U.S. 509, 515 (1878).[49]

The time-honored test for military jurisdiction was set out well before World War II by one of the country's foremost experts on military law: The crime "... must have been committed under such circumstances as to have directly offended against the government and discipline of the military state." Winthrop, Military Law and Precedents 723-24, 2d ed. (1920 reprint). Flemings' crime of AWOL met this test. His alleged auto theft, however, did not, and the court-martial was without jurisdiction to try him for it. His conviction for that crime is, therefore, a nullity.

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[49] A final factor relied upon by the government in the courts below, the status of the "victim" as a serviceman, here has no military significance. In some situation, the status of the victim would establish a service connection. This would be true where, for example, the crime arose out of a grudge relating back to either party's military status or duties. In the instant situation, though, as found by the court below, "The fact that the owner of the car was a member of the Armed Forces was a 'happenstance' with 'no military significance,'" *Flemings*, 458 F.2d at 548, citing *Armes, supra.* The theft would have had no impact whatsoever upon the military had it been committed by a civilian, or had it involved a vehicle owned by a civilian (as the Navy believed in 1944). There is no special military disciplinary interest created by the chance status of the owner as a serviceman—especially when the Navy in 1944 charged Flemings with theft of a vehicle owned by a civilian.

CONCLUSION

WHEREFORE, respondent prays that the judgment of the courts below be affirmed.

Respectfully submitted,

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